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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1412~~ 230

RAMONA CIPRES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari Directed to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

RAMONA CIPRES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari Directed to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Ramona Cipres, respectfully petitions this Honorable Court for a writ of certiorari to review and reverse the judgment of conviction of the United States District Court for the Southern District of California, Central Division, and in respect thereto sets forth:

Jurisdiction

Jurisdiction is conferred by Section 1254(1), Title 28, U. S. Codes, and by the Rules of this Court.

The decision of the United States Court of Appeals for the Ninth Circuit was first rendered on March 18, 1965 (343 F.2d 95). The case was remanded for further proceedings to the United States District Court, which thereafter held a hearing and made findings of fact and conclusions of law in effect reaffirming its previous judgment, which was appealed to the United States Court of Appeals for the Ninth Circuit and again affirmed on March 31, 1966. A petition for rehearing was duly and regularly filed within the time provided by law and that court denied the petition for rehearing on May 11, 1966.

Opinion Below

The decision of the Court of Appeals is reported in *Ramona Cipres and Juan Montes DeOca v. United States*, 343 F.2d 95, and again in their decision of March 31, 1966, copies of both of which are attached hereto, marked Appendices A and B, respectively.

Constitutional Provisions and Statutes Involved

The constitutional provisions and statutes involved herein are the Fourth Amendment, Fifth Amendment and Sixth Amendment to the Constitution of the United States; and Title 21, Section 176a, U. S. Codes, all of which are set forth in Appendix C hereof.

The Facts

Customs agent Neil Greppin and Los Angeles police sergeant D. W. Beckman had received information from an unidentified informer that a man named Julian Martinez was suspected of involvement in trafficking narcotics from New York to Los Angeles and Los Angeles to New York. Allegedly, Julian Martinez was a Cuban marijuana trafficker. (R.T. 153)

The officers left word at the air lines that if a man named Martinez called for a reservation or flight, to notify them. It was discovered that the American Air Lines had a reservation on a flight leaving at 10 p.m. on September 17 under the name of Martinez. (R.T. 153) This, however, was believed to be a man.

At approximately 9:50 p.m., Greppin saw petitioner Cipres and Juan Montes DeOca get out of a 1959 salmon colored Pontiac, California license No. LMC 357 (R.T. 135, 138), which was registered in the name of a Manuel Gonzales. The officers watched as DeOca removed two *suitcases* from the car, Exhibits 1 and 2, and handed them to a porter stationed at the curbside. (R.T. 137, 139) DeOca was recognized by agent Greppin as the subject of previous surveillance relative to narcotic trafficking. Sgt. Beckman testified that prior to the officers arrival at the airport, "A previously reliable informant of the Los Angeles Police Department had informed the department that Juan Montes DeOca was running marijuana for his brother, Oscar DeOca". DeOca was observed to get back in the Pontiac and drive away from the terminal. (R.T. 140)

Petitioner Cipres was observed to follow the airport porter with the suitcases to the American Air Lines counter. Cipres called for reservations under the name of Martinez (R.T. 140) and as she did so, Police Officer Beckman and Agent Greppin observed that the bags, when placed on the weighing machine at the ticket counter by the porter, weighed approximately 140 pounds. (R.T. 140, 162) The officers then approached petitioner Cipres, identified themselves as police officers and stated that they were conducting a narcotic investigation concerning her. (R.T. 142, 165)

When asked for her identification, petitioner Cipres stated that her real name was Cipres but sometimes she

used the name of Martinez in travelling. Officer Beckman then asked her if she would step away from the counter where he could talk with her further and he picked up one of the heaviest suitcases off of the scale and walked away from the counter with petitioner Cipres while Greppin pulled the second bag off the air line conveyor belt, left it at the counter and joined the others.

They questioned Cipres about the contents of the suitcases and she answered that she had clothing in them. When they asked if they could search the suitcases, petitioner Cipres said she had nothing to hide but the bags were locked and the keys were in New York. (R.T. 145) At this point, Greppin returned to the second bag, picked it up and, pushing the sides in and placing his nose to the seam of the suitcase, he smelled an odor which he said was familiar to him, namely, that of marijuana. He thereupon opened the suitcases, which were found to be unlocked, and discovered that they contained marijuana. (R.T. 147, 162, 184) Agent Greppin then walked over to Beckman and Cipres and at that point advised petitioner Cipres she was under arrest. The other bag was subsequently opened at the airport and also found to contain marijuana. (R.T. 186) Neither bag was found to be locked.

At the trial in the District Court and during the course of Agent Greppin's testimony, petitioner Cipres challenged the admissibility of the suitcases containing the marijuana, Exhibits 1 and 2, on the grounds that they constituted the fruits of an unreasonable search. The trial court then took evidence outside the presence of the jury which related to the search which occurred at the airport where petitioner Cipres was arrested. The District Court found that the search in question was made with the voluntary consent of Cipres and denied the motion. (R.T. 176) The jury trial resumed, the suit-

cases were admitted in evidence and the defendants were convicted.

Later in the trial a motion for suppression was renewed by petitioner Cipres and the court again denied the motion, stating:

> "I think, counsel, whether or not consent was given was a question of fact. I have ruled against you. I have said if permission was given, and permission was given, why that rules out the question of illegal search and seizure." (R.T. 532)

Because of the District Court's decision that consent had been given to the search, no ruling was made by the District Court as to whether or not the officers had probable cause to seize and search the bags or to arrest petitioner Cipres.

On the first appeal to the Circuit Court, the case was remanded, the Court stating:

> "Giving full credit to the officers' testimony that Cipres orally consented to the search, a substantial question still remained as to whether she waived her constitutional privilege. A number of circumstances suggest that her arrest may have reflected less than a free, deliberate, and unequivocal decision to permit the officers to open the luggage: it was obtained "under color of the badge" and therefore presumptively coerced; it was coupled with the statement that the bags were locked and the keys unavailable, which on its face would have rendered the consent ineffectual; it was accompanied by assertions that Cipres was innocent and that the suitcases contained innocuous articles and not marihuana, assertions certain to be exposed as false the moment the bags were opened; and admittedly Cipres asked if the officers had a search warrant.

"Because of the overly narrow view which the district court apparently took of the question presented, it did not explore and determine the issue of waiver in the light of these and other circumstances surrounding the arrest. We remand the case so that this may be done, either on the present record or after such further hearing as the court may deem appropriate.

"As we have noted, Cipres was arrested immediately following the discovery of the marihuana. The government urges that the arrest was valid, and that the search should be upheld as incident to it. We have held that a prior search may be valid as incident to a substantially contemporaneous arrest without a warrant if the arresting officers had probable cause for the arrest at the time of the search, and the circumstances suggested that immediate search was necessary to preserve material subject to seizure. Thus the inquiry would be whether at the moment the bags were searched the officers had reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that Cipres was committing an offense, and that removal of the evidence was threatened. But these also are questions of fact to be decided initially by the district court. That court has not yet done so; having found that Cipres 'consented' to the search, the district court thought it unnecessary to determine whether the search might have been valid upon any other ground. Unresolved factual issues were likewise raised by the government's contention that the search was justified by 19 U.S.C.A. § 482. To avoid a further multiplication of hearings and appeals, these issues should be resolved by the district court on remand."

The Court of Appeals, in affirming the judgment, set forth that the Customs agent and the police had obtained information from another source so that the information from the informer was not important. However, the information which the officers had obtained regarded an entirely different shipment and had no relation to the shipment on the day in question.

On a petition for rehearing, the Court of Appeals was again asked to correct its opinion based upon an error of fact but declined to do so.

Questions Presented

1. Whether the search of the bags, without a warrant and without probable cause, violated petitioner's rights under the Fourth Amendment to the Constitution of the United States.

2. Whether the seizure of the bags, based upon the illegal search, was in violation of petitioner's constitutional rights under the Fourth Amendment to the Constitution of the United States.

3. Whether the arrest of petitioner, following the search and seizure and without a warrant, violated her constitutional rights under the Fourth, Fifth and Sixth Amendments to the Constitution of the United States.

4. Whether an arrest, based upon a search and following a search which itself is illegal, is void as the product of an illegal search and seizure.

5. Whether petitioner's constitutional right under the Fourth, Fifth and Sixth Amendments to the Constitution of the United States to have counsel and to be informed of the charges against her at the time of arrest were violated.

6. Whether the question of whether or not consent was given to the search, being a question of fact which the trial court ruled against petitioner in the absence of the jury, it became again a question of fact for the jury to determine where the trial was being had by jury.

7. Whether the officers had reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that petitioner Cipres was committing an offense at the time that they searched and seized the bags and whether the removal of the evidence beyond the control of the government was actually threatened.

8. Whether there was sufficient proof by the government of any guilty knowledge on the part of petitioner Cipres.

9. Whether the finding of the trial court below, Finding 24, "That this was marijuana in the two *trunks* in question" was an error of fact requiring a reversal when there were no trunks involved and whether other errors of fact require reversal.

Reasons for Granting the Writ.

The case is in conflict with well known decisions rendered by this Honorable Court.

Here was a young lady being brought to the airport by someone else and he took the bags out of the automobile and gave them to a porter at the airport. Then he drove away. The officers were looking for a *man* named Martinez, not for a *woman*. They had no reasonable information that this petitioner was committing a crime nor, in fact, is there any proof that she had any guilty knowledge that she was committing any crime.

The officers made a search of one of the bags by smelling it. This they did without a warrant. This search resulted in a seizure and thereafter an arrest of

the petitioner herein. This certainly violated *Silverthorne Lumber Co. v. U.S.*, 251 US 385, 64 L.ed. 319, wherein this Court said that a search cannot be justified by what is turned up at the search. The seizing officer had to smell the suitcase in order to determine whether it contained anything illegal. This is a search forbidden by the Constitution of the United States, without a warrant.

Johnson v. U.S., 333 US 10, 92 L.ed. 436

The Fourth Amendment forbids two things: illegal search and illegal seizure.

Boyd v. U.S., 116 US 616

Takahashi v. U.S., 143 F.2d 118

The arrest followed (a) the illegal search and (b) the illegal seizure, and was not contemporaneous with it but was subsequent to it. Such procedure is contrary to the Fourth Amendment.

Mapp v. Ohio, 367 US 643;

Irvine v. California, 347 US 128;

Amos v. U.S., 255 US 315;

Kremen v. U.S., 353 US 346;

Miller v. U.S., 357 US 301;

Giardanello v. U.S., 357 US 480.

Standards for probable cause are set out in *One 1958 Plymouth Sedan v. Pennsylvania*, 380 US 693; *Aguilar v. Texas*, 478 US 108; *Stanford v. Texas*, 379 US 476; *Preston v. U.S.*, 376 US 364; *Beck v. Ohio*, 379 US 89; *Johnson v. U.S.*, 333 US 10.

Petitioner's constitutional rights under the Fourth, Fifth and Sixth Amendments were violated in this case.

The ruling of the Court was contrary to the Fifth Amendment to the Constitution of the United States.

In *One 1958 Plymouth Sedan v. Pennsylvania,* 380 US 693, 14 L.ed.2d 170, Mr. Justice Black said:

> "This Court in *Mapp v. Ohio,* 367 US 643, 6 L.ed.2d 1081, 1085, recognized as the Court had in *Boyd* that 'the Fourth and Fifth Amendments run almost into each other.' 116 US at 630, 29 L.ed. at 751. . . . the Fourth and Fifth Amendments together . . . forbid the use in court of evidence obtained through an unreasonable search or seizure. 367 US at 646-647, 6 L.ed.2d at 1085. Use of such evidence, the Court said in *Mapp,* would be 'tantamount to coerced testimony.' 367 US at 656, 6 L.ed.2d at 1091."

During the trial, the petitioner wanted to know the name of the alleged reliable informant from whom Greppin claimed he had received his information. (R.T. 26) The court said it believed that the government was required to give it. On rehearing the court affirmed the judgment and denied the request, stating that it was not material since the officers received their information from another source. This proved to be erroneous. The facts in the record do not support this statement. The marijuana referred to was another shipment in September of 1963 which was brought across the border by someone else. However, on petition for rehearing the Court of Appeals denied the same.

It is elemental that where a court acts under a mistake of fact, that it will even recall the remittitur and grant a rehearing of the matters referred to.

People v. Rothrock, 14 Cal.2d 34

Rowland v. Kreyenhagen, 24 Cal. 52

Trumpler v. Trumpler, 123 Cal. 248

Isenberg v. Sherman, 214 Cal. 722, 23 Cal.L.Rev. 354

State v. Ramirez, 34 Ida. 623, 29 ALR 297

Mun. Bond Co. v. City of Riverside, 138 Cal.App. 267

Haydel v. Morton, 28 Cal.App.2d 383

3 Am.Jur. 754, Par. 1264

The court's decision also is contrary to this Court's ruling in *Escobedo v. Illinois*, 378 US 478, 12 L.ed.2d 977, and in *Massiah v. U.S.*, 377 US 201, 12 L.ed.2d 246.

The trial court also erred in failing to submit the issue of fact as to whether there was probable cause to the jury where the case was tried by the jury. The Seventh Amendment requires all issues of fact to be submitted to the jury. However, the court held that since it had determined that whether there was or was not consent was a question of fact which the court had ruled against the petitioner, that that ruled out the question of illegal search and seizure. (R. T. 532) Petitioner in the trial was entitled, therefore, since this was a question of fact, to have this issue submitted to the jury along with other issues.

On the remand, the court affirmed on the question of guilty knowledge. However, there was no proof by the government of such guilty knowledge on the part of the petitioner. This was an essential element which the government should have been required to prove and which it did not prove.

The court held that at the moment the bags were searched the officers had reasonably trustworthy information of facts to believe that Cipres was committing an offense. Here she was at the airport, covered with the presumption of innocence. There was at that moment no evidence that she at any time had any knowledge that

she was committing any offense or that she had any knowledge that any offense was being committed.

There was nothing to show that she had any knowledge of the contents of the bags at any time. Guilty knowledge of their contents was just as essential to establishing that she was committing an offense as any other fact sufficient to warrant a prudent man in believing that she was committing an offense.

She was in no different position than the defendant in *People v. Gory*, 28 Cal.2d 450, 170 P.2d 433, where the defendant, in a prison camp, did not know the contents of a bag and there was no showing of any guilty knowledge of its contents. That Cipres was arrested prior to any search is shown by the evidence that the officers were detaining her and questioning her and that the contents of the bags was not known was clearly shown by the officer trying to smell the contents to speculate by an odor which he claimed was familiar to him, namely, that of marijuana. The other bag was subsequently opened at the airport. Both bags, although unlocked, required inspection and examination to determine their contents, although at the very moment that Cipres was arrested the officer did not have any reasonable or any trustworthy information sufficient to warrant a prudent man in believing she was committing an offense, and that removal of the evidence was threatened.

The court erred in holding that the government did not have to disclose the name of the informant without collaterally dismissing the case and discharging petitioner.

The refusal of the government to disclose the informer's identity in the light of the thinness of the government's case requires a reversal.

Secrecy cannot be maintained where disclosure is necessary to a fair trial.

Roviaro v. United States, 353 US 53, 1 L.ed.2d 659

In the *Roviaro* case, the court said:

> "Where the disclosure of an informant's identity or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to the fair determination of a cause, the privilege must give way."

In *Roviaro,* as here, the petitioner was charged with a narcotic violation. In the *Roviaro* case it was the sale. An unidentified informant was supposed to have given the information. The testimony of the narcotics agents and police officers, who by prearrangement with the unnamed informer followed petitioner and the informer and observed the transaction, while seemingly conclusive of guilt, brought about a reversal of the conviction for refusal to compel disclosure of the informer's name and address.

The identity of the informer as reliable in this case likewise became important. The right of petitioner to produce evidence which would show that the informer was not reliable and that the officers did not have any basis for their search from a reliable informer is certainly a necessary part of the defense in this case and deprived petitioner of fair trial guaranteed by the due process clause of the Fifth Amendment to the Constitution of the United States.

Brady v. Maryland, 373 US 82, 10 L.ed.2d 215

The search cannot be justified by what is turned up at the search.

Silverthorne Lumber Co. v. United States, 251 US 385, 64 L.ed. 319

In *Priestly v. Superior Court,* 50 Cal.2d 812, 330 P.2d 39, an informer told the police that the defendant had

narcotics. The officers went to the apartment and arrested the man, without a warrant, and searched the apartment, finding drugs. The court there said:

> "If testimony of communications from a confidential informer is necessary to establish the legality of the search, the defendant must be given a fair opportunity to rebut that testimony. He must therefore be permitted to ascertain the identity of the informer, since the legality of the officer's acts depends upon the credibility of the information, not upon facts that he directly witnessed and upon which he could be cross-examined. If an officer were allowed to establish unimpeachably the lawfulness of a search merely by testifying that he received justifying information from a reliable person whose identity cannot be revealed, he would become the sole judge of what is probable cause to make the search. Such a holding would destroy the exclusionary rule. Only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the informer can the court make a fair determination of the issue." (50 Cal.2d at 818)

It is therefore apparent that:

(1) There was no waiver on the part of petitioner to a search and to a seizure, both being separate elements requiring consents.

Boyd v. United States, 116 US 616, 29 L.ed. 746

Takahashi v. United States, 143 F.2d 118

(2) There was no reasonable or probable cause to believe that petitioner was committing a felony or that she had any guilty knowledge of the contents of the bags at the time of her arrest.

(3) Both the search and the seizure were conducted without a warrant and without probable cause subsequent to the arrest.

(4) Petitioner was deprived of an opportunity to determine probable cause from the refusal of the government to reveal the identity of the informer and, having elected to refuse to identify the informer, Petitioner was entitled to a dismissal.

United States v. Coplon, 191 F.2d 749

WHEREFORE, petitioner prays that this Court grant certiorari and reverse the judgment below.

Respectfully submitted,

MORRIS LAVINE

Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RAMONA CIPRES and JUAN MONTES DEOCA,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 19,217

[March 18, 1965]

Appeal from the United States District Court for the Southern District of California Central Division

Before: HAMLEY, KOELSCH, and BROWNING, Circuit Judges

BROWNING, Circuit Judge:

Ramona Cipres and Juan Montes DeOca appeal from convictions for trafficking in marijuana contrary to 21 U.S.C.A. § 176(a).

I

Appellants argue that the district court erred in admitting into evidence two suitcases containing marijuana, contending that the evidence was secured by conduct violating Cipres' Fourth Amendment right to freedom from unreasonable search and seizure.

The marijuana was discovered and seized at the Los Angeles International Airport by a Customs agent and

an officer of the Los Angeles Police Department. Their testimony relevant to the search and seizure was as follows: In September 1963, a man known to be engaged in narcotics traffic between Los Angeles and New York City checked in at a Los Angeles hotel under the assumed name of "Martinez." The airline companies were asked to advise the authorities of any reservations made in that name. On September 17, American Airlines informed the Customs Service that such a reservation had been made for an evening flight to New York City. The Customs agent and the police officer stationed themselves near American Airlines' check-in counter. Shortly before the scheduled departure time of the flight a car drove up to the adjacent curb and both appellants alighted. The Customs agent recognized DeOca as a person he had investigated earlier for possible involvement in narcotics traffic. DeOca took two suitcases from the car trunk, set them on the curb, returned to the car, and drove off. A porter took the bags to the check-in counter and set them on the scale. Cipres followed. The Customs agent observed that the bags weighed 140 pounds, and heard Cipres ask for a reservation in the name "Martinez." The officers identified themselves to Cipres, told her they were conducting a narcotics investigation, and wished to talk with her. In response to their questions, she told them her name was Cipres, but that she sometimes used the name Martinez in traveling. She said the bags contained clothing, but added, in explanation of their weight, that they also contained cosmetics. The officers told Cipres they suspected the bags contained marijuana. She denied it. They asked if they could search the bags. She answered, "Yes, I have nothing to hide," but added that she had left the keys in New York City. They examined the bags and found them unlocked. The Customs agent opened the bags, discovered the marijuana, and arrested Cipres.

Cipres denied consenting to the search. She testified that the officers accosted her and asked about the contents of the bags. She asked if they had a search warrant, but they simply proceeded to open the bags. The officers admitted that Cipres asked if they had a search warrant, but only after the Customs agent had opened the bags with her permission and discovered the marijuana.

The District court treated the issue as simply whether or not Cipres told the officers they might search the suitcase. Seeing "no reason why I should disbelieve the testimony of the two officers," the court admitted the evidence.

But the issue the court was required to decide was much broader, and could not be resolved simply by weighing the credibility of Cipres against that of the officers. The issue was whether Cipres had waived her constitutional immunity from unreasonable search and seizure. Waiver, in this context, means the "intentional relinquishment of a known right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). Such a waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the persons known may be freely and effectively withheld.[1] We recently sustained a district court finding that such waiver was lacking despite an express verbal consent,[2] and such cases are

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[1] See generally, Comment, 113 U. Pa. L. Rev. 260 (1964).

[2] *Montana v. Tomich,* 332 F.2d 987 (9th Cir. 1964), affirming *Application of Tomich,* 221 F.Supp. 500 (D. Mont. 1963).

common.[3] They rest not only upon the nature of waiver itself, but also upon a recognition that the purpose of the exclusionary rule is not only to discourage overreaching by police officers, but also, and primarily, to protect the rights of the citizen. The crucial question is whether the citizen truly consented to the search, not whether it was reasonable for the officers to suppose that he did.[4]

Giving full credit to the officers' testimony that Cipres orally consented to the search, a substantial question still remained as to whether she waived her constitutional privilege. A number of circumstances suggest that her assent may have reflected less than a free, deliberate, and unequivocal decision to permit the officers to open the luggage: it was obtained "under color of the badge" and therefore presumptively coerced;[5] it was coupled with the statement that the bags were locked and the keys unavailable, which on its face would have rendered the consent ineffectual;[6] it was accompanied by assertions that Cipres was innocent and that the suitcases contained innocuous articles and not marijuana, assertions certain

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[3] See, e.g., United States v. Marrese, 336 F.2d 501, 504 (3d Cir. 1964); Pekar v. United States, 315 F.2d 319, 324-25 (5th Cir. 1963); Villano v. United States, 310 F.2d 680, 684 (10th Cir. 1962); Channel v. United States, 285 F.2d 217, 219 (9th Cir. 1960); Higgins v. United States, 209 F.2d 819, 820 (D.C. Cir. 1954); Nelson v. United States, 208 F.2d 505, 513 (D.C. Cir. 1953); Catalanotte v. United States, 208 F.2d 264, 268 (6th Cir. 1953); Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951). See also Greenwell v. United States, 336 F.2d 962, 967-68 (D.C. Cir. 1964).

[4] Manwaring, 16 Stan. L. Rev, 318, 334-35 (1964).

[5] United States v. Page, 302 F.2d 81, 84 (9th Cir. 1962).

[6] Application of Tomich, supra, note 1, 221 F. Supp. at 503.

to be exposed as false the moment the bags were opened;[7] and admittedly Cipres asked if the officers had a search warrant.

Because of the overly narrow view which the district court apparently took of the question presented, it did not explore and determine the issue of waiver in the light of these and other circumstances surrounding the arrest. We remand the case so that this may be done, either on the present record or after such further hearing as the court may deem appropriate.[8]

As we have noted, Cipres was arrested immediately following the discovery of the marijuana. The government urges that the arrest was valid, and that the search should be upheld as incident to it. We have held that a prior search may be valid as incident to a substantially contemporeaneous arrest without a warrant if the arresting officers had probable cause for the arrest at the time of the search, and the circumstances suggested that immediate search was necessary to preserve material sub-

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[7] Channel v. United States, 284 F.2d 217, 221 (9th Cir. 1960); Higgins v. United States, 209 F.2d 819, 820 (D.C. Cir. 1954); Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951). See also United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962). But see Martinez v. United States, 333 F.2d 405, 407 (9th Cir. 1964), *vacated and remanded* ..... U.S. ..... March 15, 1965).

[8] See Martinez v. United States, ... U.S. ..... (March 15, 1965); Rios v. United States, 364 U.S. 253, 260-62 (1960); Masiello v. United States, 304 F.2d 399, 401 (D.C. Cir. 1962); United States v. Page, 302 F.2d 81, 86 (9th Cir. 1962).

ject to seizure.[9] Thus the inquiry would be whether at the moment the bags were searched[10] the officers had reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that Cipres was

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[9] Dickey v. United States, 332 F.2d 773, 778 (9th Cir. 1964); Fernandez v. United States, 321 F.2d 283, 286-87 (9th Cir. 1963); Busby v. United States, 296 F.2d 328, 332 (9th Cir. 1961). See also United States v. Haley, 321 F.2d 956, 958 (6th Cir. 1963). Compare Mosco v. United States, 301 F.2d 180, 187-88 (9th Cir. 1962); Shadoan, Law and Tactics in Federal Criminal Cases 67 (1964); Collins, 50 Cal. L. Rev. 421, 441-42 (1962); Manwaring, 16 Stan. L. Rev. 318, 344-46 (1964); (Orfield, 24 La. L. Rev. 665, 681, 82 (1964). The Supreme Court has reserved the question. Ker v. California, 374 U.S. 23, 42-43 (1963). See also Stoner v. California, 376 U.S. 483 (1964).

It has been suggested that since the rule has been applied only where there were reasonable grounds to believe that imminent destruction or removal of material subject to seizure was threatened (prior to the searches in *Busby* and *Haley* the officers saw, and in *Fernandez* smelled, probable contraband in temporarily stopped automobiles, in *Dickey,* a probable possessor of narcotics was moving toward a bathroom), and hence is merely an application of the accepted principle that the Fourth Amendment does not preclude a search without a warrant in such "exigent circumstances" exception to the general rule requiring a search warrant is independent of that permitting a warrantless search incident to a valid arrest (United States v. Ventresca, ... U.S. ..... n. 2 (March 1, 1965); United States v. Jeffers, 342 U.S. 48, 51 (1951); Johnson v. United States, 333 U.S. 10, 14 (1948)), and if applicable it would be immaterial that the arrest followed the search, or that there was no arrest at all. The only relevant inquiry would be whether it was probable that contraband was both present and threatened with imminent removal or destruction.

[10] Of course, nothing disclosed by the search could be considered to justify the arrest. United States v. Di Re, 332 U.S. 581, 595 (1948).

committing an offense,[11] and that removal of the evidence was threatened.[12] But these also are questions of fact to be decided initially by the district court. That court has not yet done so; having found that Cipres "consented" to the search, the district court thought it unnecessary to determine whether the search might have been valid upon any other ground. Unresolved factual issues were likewise raised by the government's contention that the search was justified by 19 U.S.C.A. § 482.[13] To avoid a further multiplication of hearings and appeals, these issues should be resolved by the district court on remand.

II

The appellant's remaining specifications of error are insubstantial.

1. It is true, of course, that proof of mere proximity to the drug would be insufficient to establish actual or constructive "possession" within the meaning of 21 U.S.C.A. § 176(a).[14] However, the testimony regarding Cipres' responses to the officers' inquiries as to contents of the bags, plus the natural inferences from the evidence as to the placement and movements of Cipres and the suitcases, afforded an adequate basis for the jury's

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[11] This accepted definition or probable cause for arrest was most recently restated by the Supreme Court in Beck v. Ohio, 379 U.S. 89, 91 (1964). The "reasonable grounds" to believe that an offense is being committed, authorizing a Customs agent to make an arrest without a warrant under 26 U.S.C.A. § 7607 (2) is the equivalent of Fourth Amendment "probable cause." Wong Sun v. United States, 371 U.S. 471, 478 n. 6 (1963).

[12] In addition to other facts recited earlier, it appeared that one of the bags had been placed on the airline conveyor belt.

[13] See Romero v. United States, 318 F.2d 530 (5th Cir. 1963).

[14] Arellanes v. United States, 302 F.2d 603, 606 (9th Cir. 1962).

determination that the luggage was in Cipres' immediate physical custody or subject to her dominion and control. Indeed, she testified to as much at the trial, offering an innocent explanation of a possesion she did not deny.

2. No argument was offered in support of Cipres' specification of error asserting an insufficiency of proof of knowledge that the bags contained marijuana. Nonetheless, we have satisfied ourselves that the jury could properly infer guilty knowledge from evidence of record which, in the circumstances, we will not pause to detail.

3. Read in context, the trial court's comments upon the evidence, which Cipres suggests were inaccurate, were of minor importance. The court carefully instructed the jury that it was the sole judge of the facts and that the court's comments might be disregarded. No exception was taken at trial to the portions of the charge which Cipres now attacks. "We can find no plain error therein affecting the substantial rights of the appellants, nor can we find any error which would result in a manifest miscarriage of justice." *Gilbert v. United States*, 307 F.2d 322, 327 (9th Cir. 1962)

4. We find no plain error in government counsel's closing argument.

5. Finally, appellant DeOca's argument that evidence concerning a second seizure of marijuana should have been suppressed as the product of the assertedly illegal prior seizure discussed above cannot be sustained. There is nothing in the record to indicate that the two seizures were related.[15] Appellant DeOca made no suggestion in the trial court that the evidence be suppressed or ex-

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[15] Gray v. United States, 311 F.2d 126 (D.C. Cir. 1962); Lowery v. United States, 258 F.2d 194, 196 (9th Cir. 1958).

cluded as tainted by the earlier seizure, or for any other reason.[16]

Remanded for further proceedings in accordance with this opinion.[17]

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[16] Westover v. United States, ... F.2d ..... (9th Cir. 1965); Gilbert v. United States, 307 F.2d 322, 325 (9th Cir. 1962); Billeci v. United States, 290 F.2d 628, 629 (9th Cir. 1961); compare Henry v. Mississippi, ... U.S. ..... (1965).

[17] Ogden v. United States, 323 F.2d 818, 822 (9th Cir. 1963).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RAMONA CIPRES and JUAN MONTES DEOCA, *Appellants,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 20,235

[March 31, 1966]

Appeal from the United States District Court for the Southern District of California Central Division

Before: HAMLEY, KOELSCH, and BROWNING, Circuit Judges

BROWNING, Circuit Judge:

Pursuant to our remand (343 F.2d 95, 100), the district court held an evidentiary hearing and entered detailed findings and conclusions on the issues of waiver and probable cause. The court's ultimate findings were that Cipres had not waived her Fourth Amendment rights, but that at the time the suitcases were searched the officers had probable cause to believe that she was committing an offense and that an immediate search was necessary to prevent removal of the marijuana. We are satisfied from our examination of the record that those findings, and the subsidiary findings upon which they rest, are supported by the evidence.

Appellants argue that the Customs agents did not have probable cause to believe that Cipres knew the suitcases contained marijuana. As we noted on the first appeal, circumstances known to the officers were sufficient to support the jury's conclusion that the suitcases were in Cipres's immediate possession and subject to her dominion and control (343 F.2d at 99); *a fortiori*, these circumstances furnished a sufficient basis for the same inference by the officers. From the facts of immediate possession, dominion and control, the officers were justified in inferring guilty knowledge—they were not required to assume that Cipres might be able to offer an innocent explanation. *Cf. Roviaro v. United States*, 353 U.S. 53, 63 n.14 (1957). Moreover, a warrantless search was justified independent of the propriety of the arrest, for the district court found there was probable cause to believe contraband was both present and threatened with removal. See authorities cited in second paragraph of note 9, 343 F.2d at 99.

Cipres contends that the district court erred in refusing to require the government to disclose the name of an informer who had furnished the Customs agents with the inital tip that a shipment of marijuana was expected from Mexico on the day in question.

There is no direct holding by the Supreme Court on the question of when the government will be required to disclose the identity of its informer in proceedings on a motion to suppress evidence seized in a warrantless search. The rule which the Supreme Court appears to have approved is that "In these cases the Government has been required to disclose the identity of the informer unless there was sufficient evidence apart from his confidential communication." *Roviaro v. United States*, 353 U.S. 53, 61 (1957). See also *United States v. Rosario*, 327 F.2d 561, 564 (2d Cir. 1964); *United States v. Robin-*

son, 325 F.2d 391, 393-94 (2d Cir. 1963); *Costello v. United States,* 298 F.2d 99, 101-02 (9th Cir. 1962). Where the officers had sufficient information to establish probable cause aside from that provided by the informer, disclosure of the informer's identity has not been required, for in such circumstances the existence of probable cause did not depend upon the informer's reliability and disclosure of his identity would have served no useful purpose. See *United States v. Santiago,* 327 F.2d 573, 575 (2d Cir. 1964); *United States v. Elgisser,* 334 F.2d 103, 110-11 (2d Cir. 1964); *United States v. Fay,* 344 F. 2d 625, 631-34 (2d Cir. 1965). Compare *Lane v. United States,* 321 F.2d 573, 575 (5th Cir. 1963).

The rule applies to this case. The information which the Customs agents obtained from the informer contributed nothing to the existence of probable cause since the Customs agents had secured exactly the same information from another source. Before the arrest of Cipres the Customs agents overhead a conversation between the intended receivers in which they themselves disclosed the fact that they expected a shipment of marijuana to arrive on the day in question.

The judgments of conviction are affirmed.

APPENDIX C

Constitutional Provisions and Statutes Involved

Fourth Amendment, United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment, United States Constitution:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Title 21, Section 176a, United States Code:

> "Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or

clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

"As used in this section, the term 'marihuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

"For provision relating to sentencing, probation, etc. see section 7237(d) of the Internal Revenue Code of 1954."

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 230

RAMONA CIPRES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 358 F. 2d 709. An earlier opinion of the court of appeals (Pet. App. A) is reported at 343 F. 2d 95.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1966. A petition for rehearing was denied on May 11, 1966. The petition for a writ of certiorari was filed on June 10, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

224-441—66

QUESTIONS PRESENTED

1. Whether the search of petitioner's suitcases at the Los Angeles airport prior to her boarding a plane to New York was based upon probable cause.

2. Whether the trial court properly sustained government counsel's refusal to reveal the identity of an informer whose information helped lead to the search of petitioner's luggage.

STATEMENT

On December 13, 1963, after a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of trafficking in marihuana, in violation of 21 U.S.C. 176(a), and sentenced to imprisonment for five years. On March 18, 1965, the court of appeals remanded the case for further findings of fact regarding the circumstances surrounding petitioner's arrest and the search of her suitcases (Pet. App. A, 343 F. 2d 95). After a hearing on May 18, 1965, the trial court ruled the search valid as an incident to an arrest based upon probable cause. The court of appeals affirmed unanimously (Pet. App. B).

Customs agent Greppin had become familiar with a procedure used by marihuana traffickers to ship marihuana from California to New York (R. 6-9, Greppin Affidavit).[1] Reservations on an airline would be obtained by telephone under an assumed name.

[1] A two-volume record has been filed with the Clerk of this Court. Volume 2 contains the transcript of the May 18, 1965, rehearing on the motion to suppress, herein designated "R." The district court's Findings of Fact, dated June 2, 1965, and agent Greppin's affidavit are in Volume 1.

Shortly before take-off, a courier, generally a young woman of Latin extraction, would arrive at the airport and secure the flight ticket. She would pay for the ticket and for the additional cost of transporting her overweight suitcases, which contained marihuana.

In November 1962, a receiver in New York was arrested (R. 8). The arresting officer found a list of telephone calls from the receiver to Oscar de Oca, brother of petitioner's co-defendant, Juan de Oca, who lived in Los Angeles, California (R. 8, district court's Findings of Fact, par. 2). As a result, the de Oca brothers were placed under surveillance. In May 1963, one Gomez was arrested as he tried to bring 250 pounds of marihuana across the Mexican border into California. Gomez told the arresting officers that his station wagon had been left at the house of the person to whom the marihuana was being shipped. A little while later Gomez' vehicle was located parked in front of Juan de Oca's house, and after thirty days Greppin and Los Angeles police sergeant Beckmann impounded the abandoned vehicle and located a large quantity of marihuana debris inside it (R. 10–11).

In September 1963, agent Greppin and officer Beckmann received information from one Manzaneras, an informant, that the de Oca brothers were to receive a shipment of 1,000 pounds of marihuana from Mexico. From another unnamed informant they learned that the actual delivery was to be made in Los Angeles to two men, one of whom, Rodriguez, had been arrested two months previously for possession of marihuana (R. 11–12). Customs agents located the two men at a hotel. One was registered under the assumed name

"J. Martinez" (R. 11, Findings, par. 7). On September 17, 1963, by maintaining a surveillance of the hotel, agents overheard the two men engaging in a conversation to the effect that "Martinez" and his cohort expected to receive the marihuana that day. The airlines were immediately notified to contact the agents if anyone registered under the name "Martinez" for a New York flight (R. 12). Greppin and Beckmann received a call that at 9 p.m. such a reservation had been made for a 10 p.m. flight to New York.

The officers proceeded to the airport, where they began a surveillance. At 9:45, a car in which petitioner was a passenger arrived at the airport. Greppin recognized the driver as Juan de Oca (R. 13–14). Petitioner, a young woman of Latin extraction, left the vehicle and stood by two suitcases which de Oca had removed from the trunk of the car. (Findings, par. 12). After de Oca drove away, petitioner went to the ticket counter, and a porter carried her luggage there. Greppin followed petitioner and the porter to the ticket counter, and observed that the suitcases were similar in size and type to those found in Rodriguez' apartment when he was arrested (R. 15). Greppin heard petitioner ask for reservations in the name of "Martinez," and observed that her luggage weighed 140 pounds. As she took her wallet from her purse and began to pay for the ticket and excess weight, Greppin interrupted (R. 16). He and Beckmann identified themselves and asked to speak to her about their narcotics investigation. Beckmann asked petitioner for some identification, and petitioner replied that she sometimes traveled under the name "Martinez," but

that her real name was Cipres (R. 18). As Beckmann conversed with petitioner, Greppin noticed that one suitcase had been tagged and placed on a conveyor belt which took the luggage down to a loading platform. At 9:55 p.m., Greppin retrieved that suitcase from the handler, while Beckmann took the other bag from the scale (Findings, par. 16; R. 19–20).

When asked about the contents of her suitcases, petitioner replied that they contained clothes and cosmetics. Asked if the agents could search the suitcases, petitioner replied, "Yes, I have nothing to hide." (Findings, par. 17; Greppin Affidavit.) However, when asked for the keys, petitioner told the agents that the bags were locked and the keys were in New York. At this point Greppin returned to the bag which he had retrieved from the conveyor belt. By pushing the sides in, and placing his nose to the seam of the suitcase, Greppin smelled an odor familiar to him, that of marihuana (R. 21–22). He thereupon opened the suitcase (which was unlocked) and discovered marihuana. The agents then announced to petitioner that she was under arrest. The other bag was also unlocked, and, when opened, revealed its contents to be marihuana (Findings, par. 19).

At her trial petitioner moved to suppress the evidence thus obtained. The court denied her motion to suppress. It ruled that since petitioner had given her uncoerced consent to the search, it was valid, and that no other findings were necessary. The court of appeals disagreed, observing that the circumstances indicated that petitioner's consent might have been "under color of the badge." (Pet. App. A, 4.) The

case was remanded for a determination of "unresolved factual issues," including those bearing on whether the search could be justified as incidental to a lawful arrest. On remand, the district court made the following findings:

> 22. * * * [A]t the time the bags were searched the officers had reasonably trustworthy information of facts sufficient to warrant a prudent man in believing that defendant Cipres was committing an offense and that the removal of the evidence was threatened.
>
> 23. The search was valid as incident to a substantially contemporaneous arrest, for the officers had probable cause for the arrest at the time of the search, and the circumstances suggested that immediate search was necessary to preserve the material subject to seizure.
>
> 24. Having reasonable cause to believe that there was marihuana in the two suitcases in question which had been unlawfully introduced into the United States, the search was also justified by 19 U.S.C.A. Section 482 (search by customs agent).

ARGUMENT

1. Petitioner argues that the search of her luggage at the Los Angeles airport within minutes of the time her plane was about to depart was unjustifiable. The argument is without merit. This case is yet another in a series of incidents involving a marked pattern familiar to the customs agents and Los Angeles police. See *Hernandez* v. *United States*, 352 F. 2d 240 (C.A. 9), certiorari denied, June 20, 1966 (No. 1293 Misc. O.T., 1965). In the light of the factual situation that

has been detailed in the Statement, *supra*, the action taken by the police officer and customs agent was clearly justified. They had ample reason to believe that the luggage about to be placed on an airplane, and hence in transit, contained contraband. See *Carroll* v. *United States*, 267 U.S. 132; *Brinegar* v. *United States*, 338 U.S. 160.

2. At the hearing on petitioner's motion to suppress, the government declined to reveal the identity of the informer who had told them Rodriguez was to receive a shipment of marihuana. When asked how the name of the informer would be helpful, petitioner's counsel replied, "I don't know what information this informant had, whether he saw something, heard something, or was just guessing" (R. 32). After a review of the applicable law (R. 26–34), the district court, in its discretion, permitted the government not to disclose the name of the informer. In the circumstances of this case, that ruling was not an abuse of discretion.

This Court, in *Roviaro* v. *United States*, 353 U.S. 53, considered at length the balance between the public's interest in protecting the flow of information and the individual's right to prepare his defense. The Court held that where the disclosure of an informer's identity "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege [of nondisclosure] must give way." (353 U.S. at 60–61.) But, the Court noted, "[w]hether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance

of the informer's testimony, and other relevant factors." (353 U.S. at 62.)

Clearly, in this case, the attempt to have the informer's identity revealed was nothing more than "a shot in the dark." *Hurst* v. *United States,* 344 F. 2d 327 (C.A. 9). The informer took no part in the offense itself. See *Cook* v. *United States,* 354 F. 2d 529 (C.A. 9). And examination of the informer would not be pertinent to negating his reliability. An informer is reliable if he provides a flow of well founded information to the agents. Since reliability is thus in the mind of the agent, not the informer, examination of the informer to disprove his reliability would not have been legally fruitful. *Jones* v. *United States,* 326 F. 2d 124 (C.A. 9), certiorari denied, 377 U.S. 956.

Furthermore, the information that the customs agent obtained from the unidentified informer was fully corroborated. From sources independent of the informer the agents had learned of the scheme of the de Oca brothers, and one agent had overheard a conversation between the intended receivers in which they disclosed the date and time of the shipment. The "likelihood that * * * [petitioner] would have used the informant had the name been disclosed, and that the strong showing of probable cause could then have been dissipated, is thin almost to the point of nonexistence." *United States* v. *Tucker,* 248 F. Supp. 911, 917 (S.D.N.Y.). See, also, *United States ex rel. Coffee* v. *Fay,* 344 F. 2d 625 (C.A. 2); *Marderosian* v. *United States,* 337 F. 2d 759 (C.A. 1), certiorari denied, 380 U.S. 971; *Johnson* v. *United States,* 328 F. 2d 883 (C.A. 5), certiorari denied, 379 U.S. 849.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

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OCTOBER TERM, 1966

No. 230

RAMONA CIPRES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

Comes now Ramona Cipres and in answer to the opposition of the government to her petition for writ of certiorari, respectfully sets forth as follows:

I

The Solicitor General has erroneously set forth facts in his reply and has picked up an error of fact in the opinion of the Court of Appeals for the Ninth Circuit which that Court failed to correct on rehearing. The government states erroneously that "They (the officers) had ample reason to believe that the luggage about to

be placed on an airplane and hence in transit contained contraband." Where a court acts under a mistake of fact a hearing should be granted. Courts have even recalled remittiturs after judgment when the court below acted under a mistake of fact. *In re Rothrock,* 14 Cal.2d 34.

The officers had nothing on which to base any reason to believe there was any contraband in the luggage until they made an unlawful search of the luggage prior to the arrest of the appellant by squeezing the sides of the luggage and smelling its contents.[1] Such procedure has been denominated a search—an illegal search. It was only this unlawful search that enabled them to cause the arrest of the petitioner. Nor was there anything that the petitioner did that showed she had any guilty knowledge of the contents of the suitcases. They

---

1 "Q. (BY MR. VAN DE KAMP) When was the first time you touched one of the bags?

"A. Approximately 2 minutes after joining Sergeant Beckmann and the defendant Cipres and after having heard part of the conversation.

"Q. And following that conversation, which bag did you go to?

"A. As I recall, I went to the one over on the counter.

"Q. What did you do with that bag?

"A. I depressed the sides of the bag and placed my nose near the seam of the bag and gave it what we call the smell or odor test, and at that time I smelled the odor of what I believed to be marijuana.

"Q. Had you smelled marijuana on previous occasions?

"A. Yes.

"Q. How many previous occasions had you smelled it?

"A. Several hundred. (R. 22, Transcript of May 18, 1965)

* * *

(Continued)

had been brought to the airport by someone else. The particular marijuana had been stored in the garage of Manuel Angel Gonzales September 2 or 3, 1963.

In *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385, 64 L.ed. 319, this Court said:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."

II

At the hearing on petitioner's motion to suppress the evidence, petitioner sought to learn the name of the informant which the government claimed was the source of its information. The government declined to reveal the name of its claimed informant. *Roviaro v. U.S.*, 353 U.S. 53, 1 L.ed.2d 639; 8 Wigmore Section 2374, p. 753;

"THE COURT: Does marijuana have a peculiar odor or smell?

"THE WITNESS: Well, I would say that it has an odor of its own. That's the only way I can describe it.

"THE COURT: It smells different than any other narcotic?

"THE WITNESS: Yes, it does.

"THE COURT: And you were able to detect this particular odor, is that right?

"THE WITNESS: That is correct, your Honor.

"THE COURT: Were you able to detect the odor before you compressed the sides of the bag?

"THE WITNESS: No, I was not.

"THE COURT: So you went up to the counter and pushed in the side of the bag and then you detected the odor, is that right?

"THE WITNESS: That is correct." (R. 23-24, Transcript of May 18, 1965)

71 Harvard Law Review 141. The court sustained the government's objection to revealing the name of the informant.

It is respectfully submitted that the court abused its discretion.

In *Dennis v. U.S.*, 16 L.ed.2d 973 (34 L.W. 4556), this Court held that there are broadening rules of criminal discovery. In that case the Court said, quoting from *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234, "that the Court acknowledged that 'after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it.'"

The Court, also referring to criminal discovery, pointed out that it is reflected in the expanding body of material, judicial and otherwise, favoring disclosure in criminal cases analogous to civil practice.

This Court also quoted in a footnote *Alford v. U.S.*, 282 U.S. 687, where this Court reversed a trial court's ruling which deprived defense counsel of an opportunity to inquire into the background of an important government witness; *United States v. Andolschek*, 142 F.2d 503, 506, where it was held the government must produce reports — otherwise privileged — upon which the prosecution was based; *U.S. v. Coplon*, 184 F.2d 629, 636-639; and, again, *People v. Ramistella*, 306 N.Y. 379, where the court ruled the State could not use evidence of a secret identification on an automobile to prove that the automobile was stolen where it was unwilling to disclose the location of the identification mark to the defense.

Likewise, here, the identification of the informer, whether he was reliable, on what he based his claimed knowledge of any of the defendants or their activities, or whether there was any knowledge by the persons involved

as to the defendant Cipres, were essential and necessary to a fair determination of this case, and it was error to deny petitioner this right unless the government was willing to dismiss the case against petitioner herein. The Sixth Amendment requires confrontation, denied when the hearsay of the informer is relied on and not subject to cross-examination.

Pointer v. Texas, 380 U.S. 400, 13 L.ed.2d 923.

Furthermore, the informer's information would have proved that the marijuana in the suitcases was not that referred to by him, nor was it established as having been illegally transported in interstate commerce.

III

The Solicitor General states in his brief:

> "Furthermore, the information that the customs agent obtained from the unidentified informer was fully corroborated. [However the defense had a right to cross-examine.] From sources independent of the informer the agents had learned of the scheme of the de Oca brothers, and one agent had overheard a conversation between the intended receivers in which they disclosed the date and time of the ship-

ment. [This is an error of fact.][2] The 'likelihood that * * * [petitioner] would have used the informant had the name been disclosed, and that the strong showing of probable cause could then have been dissipated, is thin almost to the point of non-existence.' "

The conversation referred to by the Circuit Court, and again by the Solicitor General in his brief to this Court, was in no way connected with the marijuana seized in this case. A re-examination of the evidence will show that the marijuana seized in the suitcase or bag at the airport had been in the United States for several weeks and had been stored in the garage of one Manuel Angel Gonzales and was not the marijuana referred to by the court in its opinion nor referred to in the conversation

[2] The record discloses that one Manuel Angel Gonzales, a former Cuban, coming to the United States in 1960, allowed Oscar de Oca to store suitcases in his garage in October, 1962 (R. 23), also a big cardboard box. (R. 29) On September 8 (1963) Gonzales had a conversation with Juan de Oca. They went to Gonzales' garage and de Oca told Gonzales the suitcases contained marijuana and that he was in the business. (R. 41) It was these suitcases that were taken to the airport on the night of September 17, 1963. On that night Gonzales met Juan de Oca about 8:15 p.m. and allowed de Oca to use his car. Juan de Oca took the car, saying he was going to drive to the airport. (R. 34) The car arrived about ten minutes to ten and a man got out and took the suitcases out of the car, which the porter took.

The alleged overheard conversation at the Blair House on September 17, to which the court below referred and which is again referred to in the Solicitor's brief, referred to a shipment that day, not the two suitcases which had been stored in Gonzales' garage for some time. This purported conversation related to a supposed shipment not yet arrived and not involved in this case. (Transcript of May 18, 1965, R. 40)

Obviously, the conversation related to a shipment not yet received and in no way related to the two suitcases involved in the instant case. As a matter of fact, the record fails to disclose whether the marijuana in question was in transit other than from Gonzales' garage to the airport and where it came from.

allegedly overheard and in the information furnished the Custom's agents from the unidentified informer. Cross-examination of the informer could have proved this.

Furthermore, if, as it was claimed, the unidentified informer was fully corroborated, the original information which he allegedly supplied should have been subject to confrontation and cross-examination.

Pointer v. Texas, 380 U.S. 400, 13 L.ed.2d 923

WHEREFORE, petitioner respectfully prays that this Court grant certiorari under its supervisory powers of criminal justice: (1) because the Circuit Court of Appeals acted under a mistake of fact which requires this Court to correct; (2) because the opinion of the Court of Appeals is in conflict with this Court's decisions on unlawful searches and seizures and the Fourth and Fifth Amendments, U.S. Constitution; (3) identity of an informer and the right to cross-examine such an informer is a constitutional right; (4) upon the lack of proof by the government of any guilty knowledge on the part of this young Spanish girl, who it was not shown had any knowledge of the contents of the bags that were taken to the airport by someone else and searched and seized without a search warrant in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

Respectfully submitted,

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